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No. 09-1011

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHELE FEINBERG TRULL,

Petitioner,

vs.

MICHAEL B. FEINBERG,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHISTOPHER V. LANGONE
Counsel of Record
207 Texas Lane
Ithaca, NY 14850
607/216-2836
Langonelaw@gmail.com

ETHAN E. TRULL
1753 Spruce Street
Highland Park, IL 60035
847/579-0224

JAMES R. CAREY
DAVID E. LIEBERMAN
ROBIN D. MAHER
LEVIN, SCHREDER & CAREY
120 N. LaSalle Street
Chicago, IL 60602
312/332-6300

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Max Feinberg so opposed the very idea of his grandchildren marrying any person who is not a Jew, that he offered a cash reward, to be held over his grandchildren's heads long after Max died, and to be paid only to those grandchildren who married within the Jewish faith or if they did not marry at all. In other words, Max Feinberg preferred that his granddaughter Michele (who was only fifteen years old when Max Feinberg wrote this clause and seventeen when he died) live and die a spinster than marry a non-Jew, thereby largely also excluding, for example, African Americans, Hispanics and Asians as potential marriage partners. Respondent Michael Feinberg somehow fails to recognize the clear religious and racial bigotry embedded in this testamentary scheme. Following the Illinois Supreme Court decision, bigotry of this sort now must be enforced by the Illinois courts.

Ignoring the plain language of Max's Trust documents and its inescapable purpose, Respondent claims that there is no basis to ascribe a bigoted motive to Max Feinberg. Instead, Respondent tries to attribute noble motives, saying that Max simply wanted to promote and preserve the Jewish culture and faith that he both treasured and feared was at risk. Resp., p. 1. Of course, this is precisely the same justification routinely spewed to justify the worst

discrimination imaginable, including discrimination against Jews.

ARGUMENT

A. The Illinois Supreme Court's Decision To Repudiate *Shelley v. Kraemer* Is A Compelling Reason To Grant Petitioner's Writ

Michele Trull's Petition establishes a "compelling reason" to grant review pursuant to Supreme Court Rule 10(c), because the Illinois Supreme Court's decision is directly contrary to this Court's landmark holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948). Respondent substantially mischaracterizes Michele's argument as seeking to expand this Court's holding to prevent state courts from giving legal effect to any private document that makes a distinction based upon religion or some other suspect class. Resp., pp. 7-8. To the contrary, Michele is narrowly asking the Court to grant certiorari to provide guidance to lower courts regarding how to interpret *Shelley* in connection with the interpretation and enforcement by the state of discriminatory testamentary instruments based upon religious or racial classifications.

i. Enforcement of Max Feinberg's Religious Preference Clause Requires State Action

Respondent glosses over the critical reason why *Shelley* is applicable here. According to Respondent,

"The use of such conditions is the legal and functional equivalent of simply excluding certain potential beneficiaries by name which, all parties concede, is legally permissible regardless of the testator's underlying reasons or motivations." Resp., pp. 5-6. But of course, the use of religious or racial classifications is nothing like excluding beneficiaries by name. The former requires state action while the latter does not.

Hypothetically, Max Feinberg could have written into his will "to Michele I leave nothing because she married a gentile." The state court could enforce that testamentary disposition because it would not have to base its decision on any criteria prohibited by the Constitution.

In this case, however, the Religious Preference Clause says that Michele shall be deemed deceased if she "marries outside the Jewish faith." (App 63). This is very different from the example above, because it requires the state court to decide the case by looking at the religion of Michele's husband; if he is Jewish, Michele wins and if he is not Jewish, Michele loses.[1]

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[1] Respondent wrongly states that Petitioner Michele Trull concedes she did not marry within the Jewish faith. Resp., p. 3. To the contrary, Michele argued in every court below that the clause "marries within the Jewish faith" was too indefinite to be enforced as it could simply mean that Michele was required to marry Ethan in a Jewish ceremony – which she did – and because of the indeterminable nature of the question "who is a Jew?", upon which even Jews apparently cannot agree. (App 64). Michele only concedes here that her husband Ethan Trull is

(Continued on following page)

"The explicit use of a racial classification by the probate court would fail under strict scrutiny, just as it did in *Shelley*." Barbara Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 Cornell L. Rev. 1053, 1090-91 & n. 202 (1990).

Because the Religious Preference Clause does not exclude beneficiaries by name, but instead seeks to exclude beneficiaries based upon religious classification, it cannot be given effect simply by neutral enforcement by a state court. Instead, it requires the state court to itself engage in discrimination based upon religion. In this case, to enforce the Clause, the state court would have to: 1) determine what Max Feinberg meant by "marries outside the Jewish faith"; 2) assuming that language means (as the Illinois Supreme Court assumed without inquiry) "must marry a Jew," then determine what constitutes being a "Jew"; 3) determine whether Ethan Trull is, in fact, a Jew; and 4) if Ethan is determined not to be a Jew, deem Michele to be deceased. Even if Michele were to concede that Ethan is not Jewish, that would simply be a basis upon which the state court could make its determination; it would not relieve the court of its obligation to determine and rule whether Ethan is a Jew. Such active participation in overt discrimination by the state is prohibited by the Equal Protection

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not Jewish. The state court has not yet determined whether the spouses of any of the grandchildren are Jewish.

Clause, as interpreted by the Court in *Shelley v. Kraemer*.

ii. Michele Had a Vested Right Under Erla's Power of Appointment

Michele's rights vested when Erla Feinberg died. The Illinois Supreme Court pointed out that Erla's exercise of her Power of Appointment created a mere expectancy, contingent upon her dying without further amending the distribution scheme. (App 32). Of course, as a matter of undisputed fact, Erla did die without further amending the distribution scheme. From that moment, Michele had a vested right subject only to the condition precedent that she might be "deemed deceased" for having "married outside the Jewish faith." Respondent's argument that Michele did not have a vested right is circular because it depends upon the assumption that Michele was properly "deemed deceased" by the state.

Respondent mischaracterizes the state of affairs upon Erla's death. According to Respondent: "Erla's appointment, therefore, created a condition precedent on the grandchildrens' [sic] inheritances; the only relevant factual determination regarding the Clause's application was the grandchildren's marital status at the time of Erla's death." Resp., p. 5. This statement is incorrect. To determine the application of the Religious Preference Clause, the state court first had to determine the grandchildren's marital status (married or unmarried) *and* if married, then determine

whether the grandchild married outside the Jewish faith. The first part of the question can be neutrally determined. The second cannot.

The only way that Michele loses her vested interest in Max Feinberg's estate granted by Erla's Power of Appointment is by application of the condition precedent. Because the condition precedent – marriage within the Jewish faith – cannot be neutrally determined but instead requires state action, Michele cannot be divested of her interest without state action in violation of the Equal Protection Clause.

iii. The Trust and Appointment at Issue Cannot be Enforced Without State Action

Respondent states that nothing in Max's Trust or Erla's appointment required court involvement or approval. Resp., p. 3. This argument is obviously wrong and patently frivolous, considering the lengthy record below. The Religious Preference Clause here, just like the restrictive covenant at issue in *Shelley*, is self enforcing only until challenged by an affected party. Then, like any other disputed private covenant or agreement, it is only effective if enforced by a court.

iv. Michele Agrees that the Unitary View of State Action Should Apply

Respondent criticizes Michele for arguing in her Petition that even an applying the "balancing view" of state action advocated by Professor Laurence Tribe,

any application of a balancing test weighs heavily in favor of Michele. Resp., p. 24. Laurence Tribe, American Constitutional Law § 18-1, at 1688 (2d ed. 1988). Michele agrees with Respondent that the unitary view of state action is applicable, but included this argument in her Petition for Writ of Certiorari because the Illinois Supreme Court relied exclusively upon Tribe as the basis for its decision to disregard *Shelley*. If Respondent now agrees, as he says, that "there is no legal precedent for abandoning the state action doctrine," then Respondent apparently agrees that the Illinois Supreme Court made a mistake in repudiating *Shelley* and Michele's Petition should be granted.

B. The Illinois Supreme Court Failed To Address Michele's Establishment Clause Argument

Respondent argues that Michele "cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of another state court of last resort or any federal court of appeals with respect to her Establishment Clause argument." Resp., p. 24. Frankly, this is because the Illinois Supreme Court did not make any decision regarding the Establishment Clause.

The record is clear that the Illinois Supreme Court completely disregarded Michele's Establishment Clause argument in its holding. The Court should have determined whether enforcement of the

Religious Preference Clause would tend to establish a religious preference or religious faith (Respondent himself says that is its purpose) – but the Court skipped over that question.

Respondent emphasizes that neutral enforcement of a testator's intent to promote and preserve Jewish culture and faith (Resp., p. 1) cannot constitute violation of the Establishment Clause. Again, this argument is circular, because it assumes that the state court's enforcement of the Religious Preference Clause can be done neutrally and without state involvement. That is the central issue presented by this Petition for Writ of Certiorari. If, as Michele argues, enforcement of the clause requires state action, then that state action would tend to establish a religion or religious faith and the Establishment Clause is implicated.

C. If The Illinois Supreme Court's Decision Is Allowed To Stand, Then State Courts Will Be Required To Enforce "The Worst Bigotry Imaginable"

Respondent passionately objects to what he calls Michele's claim that enforcement of the Religious Preference Clause will lead to state courts being required to enforce the "worst bigotry imaginable." Resp., p. 30. Respondent omits "citations and internal quotations" (*Id.*), precisely because this quote originates not from Michele, but from Illinois Appellate Justice Quinn. (App 51). Of course, Justice Quinn was right. There is no difference between the Religious

Preference Clause at issue here and a testamentary clause designed to prevent marriages to "someone who is Jewish or black or a member of any other group that Max did not like." (Justice Quinn, App 51). The fact that this quote, from an Illinois Appellate Judge, inflames such passion from Respondent is a direct reflection of the underlying ugliness of the Clause itself. Perpetuating such bigotry should not be the business of the State of Illinois or any other state.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHISTOPHER V. LANGONE
Counsel of Record
207 Texas Lane
Ithaca, NY 14850
607/216-2836
Langonelaw@gmail.com

ETHAN E. TRULL
1753 Spruce Street
Highland Park, IL 60035
847/579-0224

JAMES R. CAREY
DAVID E. LIEBERMAN
ROBIN D. MAHER
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120 N. LaSalle Street
Chicago, IL 60602
312/332-6300